No. 13672

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HARRY J. COFFMAN,

*Appellant,*

*vs.*

COBRA MANUFACTURING COMPANY,

*Appellee.*

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## Petition for Rehearing, or in the Alternative, for Revision of Court's Opinion and Decision.

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Appellee, Cobra Manufacturing Company (for sake of brevity called "Cobra") respectfully petitions for a rehearing, or in the alternative, for a revision of the opinion and decision of this learned Court filed herein on June 28, 1954, reversing the factual findings made by the learned United States District Court of the Southern District of California Central Division, and the judgment of said last mentioned Court, based on said factual findings. The distinct grounds on which this petition is predicated are elaborately discussed in the supporting Points and Authorities and the appendices herewith submitted, which in the judgment of the appellee will serve to clarify and facilitate a correct understanding of the genuine and controlling factual and legal issues posed by the record. Succinctly stated, this petition is predicated on the following distinct grounds:

## I.

Under Rule 69(a) of the Federal Rules of Civil Procedure, the California substantive and procedural law is made the controlling rule in supplemental proceedings in aid of federal judgments and executions. (This was so conceded by both counsel in their briefs and at the oral argument, and it was so correctly determined in the opinion of this Court.) The decision of this Court is in irreconcilable conflict with the California Constitution and the California procedural and substantive laws as hereafter pointed out.

## II.

There is a fundamental and constitutional distinction between the jurisdiction of the federal appellate courts to review findings made by a trial judge under Rule 52(a) of the Federal Rules of Civil Procedure and the jurisdiction of the reviewing court in respect to such review under the California constitution.

A. Under Rule 52(a) of the Federal Rules of Civil Procedure the jurisdiction of an appellate court to disturb the findings of the trial judge is not subject to any statutory or constitutional limitations; under the California constitution, on the other hand, the jurisdiction of the reviewing court to set aside or reverse findings made by the trial court is circumscribed and delimited; and the reviewing court is without jurisdiction to reverse or to annul such factual findings, if they are supported by substantial evidence.

B. Sections 259a, 644, 645 and 719 of C. C. P. are *in pari materia* under which the determination made by a referee under an order of reference amounts to a *special jury verdict,* which (if supported by substantial evidence) cannot be constitutionally disturbed by the reviewing court.

C. The issue of the verity and integrity of bookkeeping entries made in the books and records under the "Uniform Business Records as Evidence Act" presents a factual question to be determined by the referee in the exercise of a sound discretion, and his determination (if supported by substantial evidence under the preponderance of the Evidence Rule) is conclusive and binding on the reviewing court.

D. The issue of "bad faith" under Section 719, C. C. P. also presents a factual question, and the determination by the referee (if supported by substantial evidence under the Preponderance of the Evidence Rule) is conclusive and binding on the reviewing court.

III.

Assuming (but not conceding) the jurisdiction of an appellate court to disregard the factual findings of the trial judge (despite the fact that same were supported by substantial evidence), the record herein establishes conclusively and as a matter of law that appellant's claim of good faith was a sham, fantastic, and palpably inconsistent with the realistic and objective facts. The record conclusively shows:

A. That the conversion of the property of the judgment debtor by appellant Coffman in excess of $20,000.00 was established conclusively by the documentary evidence, which is the best evidence (Section 1829, C. C. P), and that Coffman's claim of good faith in respect thereto, was refuted by the financial statement signed by him and submitted by the judgment debtor to the Hollywood State Bank, and also by his sworn admissions made in his answer in the Superior Court action referred to at page 88 of the record.

B. That the property and funds thus converted by appellant Coffman were assets which could be reached in a supplemental proceeding, since same could be reached in equity by a creditor's bill as formerly used in chancery.

C. That Coffman was the majority stockholder, director and president of the insolvent judgment debtor, and under the California substantive law he held the property, thus converted, *in trust* for the judgment creditor; and under no circumstances could Coffman claim an interest in said property adverse either to the judgment debtor or to the judgment creditor.

D. That under the California substantive law appellant Coffman could not under any circumstances use the property and funds of the judgment debtor in payment of, or as security for his loans and advances allegedly made by him personally to the judgment debtor.

It would follow, as a matter of law, that Coffman's claim of good faith was a sham, and that it did not present a triable issue to be determined in a plenary action under Section 720, C. C. P., or in any other cognate action, or proceeding.

IV.

It was the duty of this Court under the California constitution and under the California substantive and procedural law to make an analysis of the facts established by the record for the purpose of determining whether or not there was any evidence of a substantial character which reasonably supported the factual findings made by the learned District Court. The opinion of the Court indicates in effect (see p. 7 of the Opinion), that such an analysis was not made by this Court, and therefore there was no basis, either factual or legal, on which this Court could predicate a holding that Coffman's

claims against the judgment debtor were not made in bad faith. Furthermore, Coffman's assertion of his good faith was rejected as untrue by the learned District Court, and such determination is conclusive and binding on this Court and is not reviewable on appeal.

V.

Assuming (but not conceding) the jurisdiction of this Court to disregard the factual findings made by the trial court (despite the fact that they were supported by substantial evidence), appellant's belated contention that the special master and the District Judge lacked judicial power to adjudicate the factual integrity of his offset against the judgment debtor, is not reviewable on this appeal for the following additional reasons:

(a) This contention was not advanced at any time during the hearings before the special master, as required by the California Procedural Law.

(b) It was expressly stipulated by appellant in open court that the factual validity of his offset should be adjudicated by the special master; said stipulation was made freely and voluntarily, and his acquiescence therein precludes the appellant from raising this specific objection on appeal.

(c) This specific objection was not advanced by Notice of Motion in writing, as required by Section 259a (2), C. C. P.

(d) This specific objection was not advanced by appellant in his exceptions to supplemental report of the special master the record showing that appellant's objections to the supplemental report were predicated on the sole ground that the master's findings of facts and conclusions of law were not supported by the evidence.

## VI.

The decisions in the *Parker* case (38 Cal. 522), and in the *Finch* case (12 Cal. App. 274) referred to in the Court's opinion cogently support appellee's contentions advanced in its answering brief and at the oral argument. It would seem that these decisions were predicated upon the constitutional power of the trial judge to adjudicate factual questions, and they were not based on any peculiarity of the facts therein involved as stated by this Court at page 6 of its opinion. Assuming (but not conceding) that the constitutional power of a trier of facts to adjudicate factual issues may be measured or weighed by the peculiarities of the facts in a given case, the record herein conclusively presents *peculiar facts* from which this Court must determine as a matter of law that Coffman's claim of good faith was a sham, since, as heretofore pointed out, he held the property of the judgment debtor *in trust for the judgment creditor, and he was not an innocent garnishee.* It is respectfully submitted that the California decisions cited in footnote 12 of the Court's opinion have no application or relevancy to the facts presented by the record, since none of them involve relations between an insolvent corporation and a majority stockholder, director and officer. These decisions are distinguishable on the facts and are commented on in Appendix VIII.

Appellee respectfully submits that this petition for rehearing presents grave constitutional questions; that the opinion of this Court is in an irreconcilable conflict with the constitutional and the procedural and the substantive law of the State of California. Appellee therefore suggests (pursuant to Rule 23 of this Court) that this petition for rehearing should be heard *en banc,* and that this

panel so suggest to the Chief Judge of this Court, so that the bar may have the benefit of an exchange of the views of all of the judges of this Court on these issues.

It is further respectfully submitted that in the event this petition for rehearing is denied, that this Court direct in its mandate to the trial judge to enter an injunctive order forbidding and restraining Coffman from making any transfer or other disposition of his property until a plenary action can be commenced and prosecuted by the appellee pursuant to Section 720, C. C. P.

It is further respectfully submitted that this Court direct the Clerk of this Court not to assess any costs against the appellee on this appeal, since assessment of costs lies within the discretion of this Court. We believe that the assessment of costs should abide by the results in the plenary action.

It is respectfully submitted that the petition for rehearing should be granted, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

ERNEST R. UTLEY, and
JOSEPH B. BECKENSTEIN,

## Certificate of Counsel.

We, the undersigned, attorneys for the appellee, do hereby certify that in our judgment the Petition for Rehearing is well founded, and that same is not interposed for delay.

ERNEST R. UTLEY, and
JOSEPH B. BECKENSTEIN.

## POINTS AND AUTHORITIES.

### Preliminary Brief Statement.

Appellee prefaces the discussion of the Points and Authorities with this preliminary statement:

(1) That the hearings before the special master lasted for about one year (from August 10, 1950, to and including June 28, 1951); and Coffman was represented during said numerous hearings by counsel, who at no time voiced any objection to the jurisdiction of the special master to make a determination of the factual matters referred to him by the learned District Judge.

(2) That at said hearings a complete record was made on every conceivable factual and legal issue, and Coffman testified under oath in respect to all of his dealings with the judgment debtor, including his dealings bearing on the factual and legal validity of his claimed offset against the judgment debtor.

(3) That while *legalistically* the instant supplemental proceeding assumed the form of a proceeding under Section 719, C. C. P., *realistically* (and divorced from Coffman's belated technicalities), the hearing amounted to a complete trial on the merits, implicit in the concept of a plenary action.

(4) That at no time did Coffman or his counsel object to this procedure before the special master.

(5) The record is devoid of a showing on the part of Coffman that the record was not complete, or that he did not have his day in court. On the contrary, the record conclusively shows that the issues involving his dealings with the judgment debtor, and his asserted equities, were all presented to the special master for adjudication, and

the judgment creditor and Coffman both adduced evidence in support of their respective contentions.

It is regrettable that counsel for appellee and appellant both mistakenly assumed and erroneously represented to the court at the oral argument that there was a seeming semblance, or a close analogy, between the summary jurisdiction of a referee in bankruptcy and the jurisdiction vested in a referee or judge sitting in a supplemental proceeding. Counsel for appellee have since re-examined the law on this important subject, and have become firmly and definitely convinced that there was no semblance of any kind between the jurisdiction of a referee in bankruptcy and the power of a referee or judge sitting in a supplemental proceeding. Counsel for appellee is of the firm opinion (which is supported by the authorities cited in the appendices) that the power of a referee or judge sitting in a supplemental proceeding stems from the California constitution, and that, pursuant to and in obedience to the California constitutional mandate, the referee or judge sitting in supplemental proceeding is a constitutional finder of the facts, whose determination is binding on the appellate court. This constitutional mandate is implicit in Sections 259a and 644 and 645 of the California Code of Civil Procedure, which are *in pari materia* with Section 719, C. C. P. By virtue of this constitutional mandate and based on the aforesaid sections of the California Code of Civil Procedure, the referee sitting in a supplementary proceeding is the constitutional finder of the facts, and his factual determination has the effect of a *special verdict of a jury*, and is conclusive on the reviewing court if his finding is supported by substantial evidence. (*Williams v. Flinn & Treacy,* 61 Cal. App. 352, 214 Pac. 1024.)

It is unfortunate that neither counsel had made a thorough study of the law on this important subject. Counsel for appellee state in all sincerity that they are greatly disturbed by their failure to make a more careful research of the law, lest such failure may have caused this learned Court to accept their mistaken representation at oral argument at its face value.

Counsel for appellee therefore respectfully pleads the indulgence and forbearance of this Court for their neglect to adequately assist this Court in its determination of this basic and vital legal issue.

For the benefit of this Court, we quote *in extenso* from the authorities submitted in support of the grounds set forth in the petition for rehearing.

The extended excerpts are set forth in the appendices.

These points while repetitious to some extent, will serve to aid this Honorable Court in resolving the key legal issues, namely: (1) Whether under the California Constitution and Sections 259a, 644, 645 and 719 of the California Code of Civil Procedure (which are all *in pari materia*) this Court possesses jurisdiction to substitute its own conclusionary factual findings for those of the trier of the facts, and (2) Whether a majority stockholder, and director and president of an insolvent corporate judgment debtor, stand in the shoes *of an innocent third party garnishee,* whose good faith denial of his indebtedness to the judgment debtor may under peculiar facts present a triable issue under Section 720 of the California Code of Civil Procedure.

## Summary of Contentions.

### I.

There is a fundamental and constitutional distinction between the jurisdiction of the federal appellate courts to review findings made by the trial judge under Rule 52(a) of Federal Rules of Civil Procedure, and the jurisdiction of the reviewing court under the California Constitution, and under Sections 249a, 644 and 645 and Section 719, C. C. P., all of which are *in pari materia.*

A. Under Rule 52(a) of the Rules of Civil Procedure, the jurisdiction of the federal appellate court to annul, or not to accept the findings of a trial judge or of special masters *is not proscribed by any statutory or constitutional limitations*; rule 52(a) is based on the practice in equity that had prevailed prior to the present rules of civil procedure, and the findings of the trial court were never conclusive upon the federal appellate courts. While the findings of the trial court had great weight, the federal appellate court was not prohibited from setting them aside if it was left with a definite and firm conviction that a mistake has been committed by the trial judge. (See Appen. I.)

B. Under the Constitution of the State of California, the trier of the facts is *the constitutional finder of the facts,* and his determination (if supported by substantial evidence) is conclusive and binding upon the appellate court, and the appellate court is divested of power to have them set aside. Under Section 259a, C. C. P., a commissioner appointed to conduct a hearing under an order of reference is constitutionally empowered to make factual findings; and under Sections 644 and 645, C. C. P., the factual findings of the referee have the effect of *a special jury verdict* which the appellate court has no constitu-

tional power to set aside if said verdict is based on substantial evidence. The issue of the verity and integrity of books and records under the "Uniform Business Records as Evidence Act," is a factual question to be determined by the referee in the exercise of a sound discretion, and his determination (if supported by substantial evidence) is conclusive on the appellate court. (See Appen. II.)

II.

The findings of the special master epitomized in his two reports (which were adopted by the learned District Judge) were supported by substantial evidence, as defined by the California decisions (see Appen. III); said findings are conclusive upon this Court, and this Court possesses no power to have them set aside. The reviewing court has no constitutional power to reject or disregard legitimate inferences which may be drawn by the trial judge from the evidence. The testimony of Coffman in support of his asserted offset against the judgment debtor was rejected by the master as lacking integrity, and his such determination is binding on this Court, and is not reviewable on appeal. (See Appen. III.)

III.

Proceedings under Section 719, C. C. P., are civil in nature. In civil proceedings, proof beyond a reasonable doubt is not required, even in cases where the theory of the case involves an accusation of a felony, and though the result thereof imputes a crime. There is no rule of law that adopts any sliding scale of belief in civil actions, since proof by the preponderance of the evidence satisfies the legal requirement. Section 2061(5), C. C. P., expressly states that the decision of the trier of facts must be according to a preponderance of the evidence; and

Section 2103, C. C. P., expressly provides that the decision of a referee under an order of reference must also be according to the preponderance of the evidence. The preponderance evidence rule equally applies to civil proceedings involving conversion of assets by a trustee, or any other fiduciary, or a director or officer of an insolvent corporation. It is sufficient to prove said conversion only by a preponderance of the evidence, and not beyond a reasonable doubt. (See Appen. IV.)

IV.

The expression or phrases to the effect that the evidence must be clear, explicit, unequivocal, so clear as to leave no substantial doubt, states only a rule of evidence *directed to the trial judge;* and whether the evidence was clear and convincing is a question for the trial court to decide, whose determination (if supported by substantial evidence under the preponderance of evidence rule), is binding and conclusive on the appellate court. In the case at bar, the special master found that the books and records of the judgment debtor lacked integrity; this determination was based on substantial evidence, and is binding and conclusive on this Court, and same is not reviewable. (See Appen. V.)

V.

Coffman's conversion of the property and assets of the judgment debtor in excess of $20,000.00 was established conclusively and undisputably by the documentary evidence, which is the best evidence (C. C. P., Sec. 1829.) Same constituted an indebtedness which can be reached in a supplemental proceeding. Coffman, being the majority stockholder, director, and president of the insolvent judgment debtor, held said property *in trust* for the bene-

fit of the judgment creditor. Under Sections 2229, 2232, 2236, and 2237 of the California Civil Code, Coffman had no legal right to convert said assets for his own individual use. Being a trustee, Coffman could not set up a claim to the trust property adverse to the judgment debtor, and under no circumstances could he deny title to the property in the judgment debtor. Being trustee, Coffman could not use the trust property in payment of his advances and loans allegedly made by him personally to the judgment debtor. (See Appen. VI.)

VI.

It was the duty of this Court to analyze the record for the purpose of determining whether or not there was any evidence of a substantial character which reasonably supported the findings of the learned District Judge. (*Estate of Bristol,* 23 Cal. 2d 221, 223.) The opinion of the Court indicates in effect (see p. 7) that this Honorable Court did not make such analysis, and it is respectfully submitted that there was no basis on which this Court could predicate a holding that Coffman's claims against the judgment debtor were not made in bad faith.

VII.

Supplemental proceedings are in effect a continuation of the principal action in which the judgment sought to be enforced was entered. (*Hatch v. Door,* 4 McLean 112 (U. S. Cir. Ct., Mich.).) Some are calculated to furnish an inexpensive and speedy method, unhampered by delays commonly resorted to by judgment debtors and persons in privity with them, to discover and reach any indebtedness due, or property belonging to the judgment debtor, which could be reached in equity by a creditor's bill, as formerly used in chancery. (*Herrlich v. Kaufman,*

99 Cal. 271; *Travis Glass Co. v. Ibbertson,* 186 Cal. 724.) While such a proceeding is a substitute for a creditor's bill as formerly used in chancery, and while same is equitable in nature (*Booge v. First Trust & Savings Bank of Pasadena,* 46 Cal. App. 2d 879), in legal effect it is an action at law in the nature of a judgment creditor's bill in equity, *whereby the judgment creditor is afforded an adequate remedy at law.* The judgment creditor, however, is not precluded from resorting to an action in equity if a supplemental proceeding does not afford *him* an adequate remedy at law. The choice of the most effective remedy (whether by an action in equity or by supplemental proceeding) is the problem of the judgment creditor. (*Mich. State Bar Journal,* Vol. 33, April 1954 issue, at p. 44.) The text of this article was concurred in by the California Supreme Court in *Wulfjen v. Dolton,* 24 Cal. 2d 878 (referred to in footnote 12 of the Court's opinion), wherein the California Supreme Court ruled as follows:

a. That a supplemental proceeding is designed to give the judgment debtor *an adequate remedy at law* (p. 889).

b. That the remedy provided by supplemental proceeding *is not exclusive of any other remedies* which may be available to the judgment creditor (p. 889).

c. That the judgment creditor had the legal right to resort to an action in equity if such action was the most effective remedy (pp. 889, 899).

(The decision in the *Wulfjen* case does not involve the construction of either Section 719, C. C. P., or of Section 720 of C. C. P. This case is commented on in Appendix VIII.)

Assuming (but not conceding) the jurisdictional power of this Court to annul and reverse the findings of the

trier of the facts, albeit they were supported by substantial evidence, the record herein establishes undisputably and incontrovertibly that Coffman's claimed offset was a sham, fantastic, and unbelievable *as a matter of law.* As previously pointed out, Coffman held the property of the judgment debtor *in trust* for the benefit of the judgment creditor, and that he could not *under any circumstances* claim an interest adverse to the judgment debtor, and that he could not under any cricumstances use the funds of the judgment debtor in payment of, or to secure the advances or loans allegedly made by him personally to the judgment debtor. (See Appen. VI.)

VIII.

Appellant's contention, that the special master and the learned District Judge lacked judicial power to adjudicate the factual integrity of his offset against the judgment debtor, is not reviewable on this appeal, for the following additional reasons: (a) This contention was not advanced at any time during the hearings before the special master; (b) Appellant expressly stipulated in open court that the factual validity of his offset should be adjudicated by the special master. This stipulation was made freely and voluntarily, and his acquiescence therein precludes him from raising this objection on appeal; (c) This objection was not advanced by Notice of Motion in writing, as required by Section 259a(2), C. C. P.; (d) nor was his objection advanced in the exceptions to the supplemental report of the special master. The record shows that his objections to the supplemental report were predicated *on the sole ground that the master's findings of fact and conclusions of law were not supported by the evidence.* (See Appen. VII.)

## Conclusion.

On the Law of Trusts and Trustees (which is the focal legal point in the proceeding at bar) we deem it advisable to invite the court's attention to the following additional citations which, in our judgment, deserve reflective reading. They establish the fundamental proposition that:

> No one may take advantage of his own wrong. Void things are no things. He that is guilty of inequity appeals in vain to equity.

Maitland's Equity (2d Ed.), p. 80;

Maitland's Equity (2d Ed.), pp. 43, 83;

Lewin on Trusts (13th Ed.), pp. 191, 11;

1 Perry on Trusts and Trustees (6th Ed.), p. 10, Sec. 13;

26 Ruling Case Law, p. 1232;

2 Pomeroy's Equity Jurisprudence (3rd Ed.), Sec. 956;

1 Perry on Trusts and Trustees (6th Ed.), p. 355, Sec. 206;

2 Restatement of the Law of Trusts, p. 1249;

3 Reed on Statute of Frauds (1st Ed.), p. 61, Sec. 595;

Waterman, Specific Performance (1st Ed.), p. 341, Sec. 251;

*Sanford v. Sanford,* 139 U. S. 642 (11 S. Ct. 666).

In 1 Pomeroy Equity Jurisprudence (2nd Ed.), Sec. 155, the author says, in citing many cases:

> "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious

> manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, *and who is considered in equity as the beneficial owner."* (Citing *Angle v. Railway Co.,* 151 U. S. 1 (14 S. Ct. 240.)

This important subject was not discussed by the appellant either in his briefs or at the oral argument. It is self-evident that this legal and equitable point which goes to the very heart of the instant proceeding, was obfuscated by the appellant's catch phrase that Coffman was a garnishee instead of a fraudulent trustee.

Putting aside (but not abandoning) the procedural point that the jurisdictional power of the special master to adjudicate the factual issues presented by the record was not challenged by the appellant at any time during the proceedings before the special master, as required by the California procedural law; and putting aside further that the jurisdictional power of the master was not challenged by the appellant in appellant's written exceptions to the supplemental report of the master, as required by Rule 53(e)(2) of the Federal Rules of Civil Procedure, the following highlights and critical points deserve special mention:

(1) This court correctly held that Coffman was the majority stockholder, director and president of the insolvent corporate judgment debtor. It would follow *as a matter of corporation and trust law* that Coffman held the assets and the funds of the insolvent corporate judgment debtor *in trust* for the benefit of the judgment creditor, and that Coffman could not under any circumstances

use said assets and funds for his own use and benefit, and that he could not legally and equitably assert or claim any interest or a property right in and to said assets and funds. It further follows as a matter of law that Coffman's asserted interest in the assets and funds of the judgment debtor was not adverse to the judgment debtor, and that the claimed indebtedness due him from the judgment debtor was not made in good faith.

(2) To put it bluntly in unvarnished language, the factual determination of the special master and of the District Judge was to the effect that Coffman's claimed offset against the judgment debtor was made not only in bad faith, but that it furthermore *constituted a fictitional and false paper book-making entry.* This finding, we respectfully submit, is conclusive upon this Court and cannot be disturbed. This is in accord with the decision in *Rosati v. Heinman,* 126 A. C. A. 50, wherein the California Appellate Court ruled that a referee under a general order of reference possessed the jurisdictional power to make a factual adjudication on the issue of the integrity of bookkeeping entries. This is also in accord with the decision in *Perske v. Perske,* 125 A. C. A. 946, wherein the Court stated, at page 952, as follows:

> "Of course, a trial court cannot arbitrarily disregard uncontradicted testimony. But where, as here, the trial court *(by its finding that the property was not purchased entirely with appellant's funds)* has necessarily found that the so-called uncontradicted evidence *was false,* an appellate court will not interfere *if there is any basis at all to support the trial court."* (Emphasis supplied.)

(In the proceeding at bar the evidence convincingly showed that Coffman at no time had any funds of his

own on which he could predicate the genuineness and verity of his claimed offset against the debtor corporation, and the trier of the facts so found.)

It would seem that the learned opinion of this court (if same is allowed to stand, or unless it is revised or clarified) spells out the following legal principles which counsel for appellee respectfully contend are incorrect and cannot be sustained:

(1) That the prohibition imposed by the California constitution on the jurisdiction of the reviewing court to disturb the factual findings of the trier of the facts does not apply to supplemental proceedings.

(2) That C. C. P., Sections 644 and 645 are not *in pari materia* with C. C. P., Section 719; and therefore, the factual findings of a referee under an order of general reference does not constitute *a special jury verdict or a finding made by a trial judge in the same manner as if the action had been tried by the court.*

(3) That under C. C. P., Section 719 (which is admittedly a civil proceeding) the decision of the trier of the facts must not be according to a preponderance of the evidence, as required by C. C. P., Sections 2061(5) and 2103; and that under Section 719, C. C. P., the decision of the finder of the facts must rest on proofs beyond a reasonable doubt (like in criminal cases).

(4) That the phrase or expression to the effect that the evidence must be convincing, clear, explicit and unequivocal "so clear as to leave no substantial doubt" (which is used in the California decisions in typical cases where such proof is required), is not a rule of evidence which is directed solely to the trial judge; and that the reviewing court is not precluded to reject the factual

findings of the trier of facts if in *its judgment* the evidence adduced does not meet this test.

(5) That a majority stockholder, director and president of an insolvent corporate debtor does not hold its property and funds *in trust* for its creditors; that he is not a trustee, *but only an innocent third party garnishee;* and that he may make an assertion and claim that he has title or an interest adverse to the insolvent corporate debtor, and to its creditors who are the *cestui que* trust thereof.

(6) That a majority stockholder, director and president of an insolvent corporate debtor may legally use its funds in payment of, or as security for advances or loans made by him personally to the judgment debtor without the consent of or notice to the creditors. (*Cf., Saracco Tank & Welding Co. v. Platz,* 65 Cal. App. 2d 306.)

(7) That a majority stockholder, director and president of an insolvent judgment debtor may with impunity make the mere assertion that he has a claim against the judgment debtor, and that the trier of facts must accept this assertion at its face value, despite the determination of the trier of the facts that such claim was made in bad faith and was a phony and a false issue.

(8) That the good faith of Coffman's assertions (which weer all refuted by the realistic and objective facts and by the documentary evidence, and by his sworn admissions set forth in his answer to the *Fitzgerald* case) did not constitute a subversion or an abuse of process. (*Cf., Corum v. Hartford,* 67 Cal. App. 2d 891 at p. 896.)

(9) That the finder of the facts was bound to accept Coffman's claim of good faith as true despite the fact that such a rule on the record herein would make

the finder of the facts a consenting party to a fraud, upon the administration of the law. (*Cf., Serwer v. Serwer* (N. Y.), 71 App. Div. 415, 75 N. Y. Supp. 842.)

While we share the Court's view that due process of law commands a plenary action when and if there exist genuine and good faith triable issues, the record herein does not present such issues, and the finder of the facts so found, which is conclusive upon the reviewing court.

We respectfully contend that the opinion of this Court is in irreconcilable conflict with the California constitutional and procedural and substantive law under the holding of the United States Supreme Court in *Erie v. Tompkins* (304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.)

With all deference to this Court we earnestly urge that this Court has misconstrued and misinterpreted the California law. We earnestly urge that the Court reconsider the facts established by the record and the findings of the learned special master and of the District Judge in the light of the law set forth in the appendices and in the above stated Points. We are firmly convinced, and do so state without fear of contradiction, that the grounds urged in the instant petition for rehearing, or for revision of the Court's opinion are all sound, and that they merit reconsideration by this Court.

To our mind Coffman's conduct in some essential aspects is a carbon copy of the conduct that shocked the conscience of Judge Fee in the summary proceeding entertained by the bankruptcy referee in *Heath v. Helmick,* 172 F. 2d 157, referred to at page 3 of the appellant's answering brief. We are apprehensive that the opinion of the court in the proceeding at bar will tend to encourage and stimulate fiduciaries and trustees to appro-

priate for their individual use and benefit the property of the *cestui que trust* and to delay the day of judgment by making the pretense that they are *innocent third party garnishees* (rather than trustees), and that they are entitled to a plenary action, albeit such claim is specious and abstruse *as a matter of law,* and is factually inconsistent with and contradicted by the documentary evidence and the sworn admissions in the related pleadings in the *Fitzgerald* case.

We therefore respectfully request this Court that our petition for rehearing, or for revision of the opinion, be granted, and that it affirm the judgment rendered by the Honorable Peirson M. Hall, who, the record shows made a painstaking effort to properly and correctly appraise the facts in the light of the applicable law.

Respectfully submitted,

Ernest R. Utley, and
Joseph B. Beckenstein,

*Attorneys for Appellee.*

## APPENDIX I.

Under the Federal law the trier of the factual issues is *not a constitutional finder of the facts,* and the jurisdiction of the reviewing court to annul his findings is not restrained by any statutory or constitutional limitations. In the case of *Grace Bros. v. Commissioner of Internal Revenue,* 173 F. 2d 170, the Court stated, at page 174, as follows:

"It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. *Since judicial review of findings of trial courts does not have the statutory or constitutional limitation* [on judicial review] of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of a trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. *The findings were never conclusive, however.* A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citing a United States Supreme Court decision.)

"This interpretation is not a new departure. It merely stresses, as courts of appeal (including this court), have done before, that findings are to be given the effect which they formerly had in equity." (Citing Equity Rule 70½, and cases.)

See also, the authorities set forth in the footnote below.[1]

The concept of Federal Rule 52(a) is historically and basically akin to the equity practice and rules adhered to in common law states (like Michigan and Massachusetts).

In *Brown v. Kalamazoo Circuit Judge,* 75 Mich. 274 (42 N. W. 827), the Michigan Supreme Court declared at pages 277-279, as follows:

"As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as involving the necessity of separate administration in important particulars. The Constitution of the United States recognized the division of ordinary civil jurisprudence into cases at law and cases in equity, and it has been held by the Supreme Court of the United States that this recognition puts it beyond the power of Congress to make any serious change in that classification. In *Carpentier v. Montgomery,* 13 Wall. 480, the importance of the distinction, and the impracticability of disregarding it, was somewhat explained in such a case as is now under consideration, as in several previous cases it

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[1]*National Labor R. Board v. Columbian Stamping Co.,* 306 U. S. 292, 59 S. Ct. 501, 505; *Miller v. Commissioner of Int. Revenue,* 183 F. 2d 246; *United States v. Gypsum Co.,* 333 U. S. 364, 395, 68 S. Ct. 525; *Bjornsen v. Alasea S.S. Co.,* 193 F. 2d 433; *Pac. Portland Cement Co. v. Food Machinery,* 178 F. 2d 541; *Home Indemnity of New York v. Standard Acc. Ins. Co.,* 167 F. 2d 919, 922; *Fisk v. Commissioner of Int. Revenue,* 203 F. 2d 358.

had been held that the policy enjoined by Congress of securing as far as possible uniformity of practice between the state and United States courts could not be carried so far as to confound the legal and equitable jurisdictions. (Citing United States Supreme Court cases.)

* * * * * * * * *

"As Michigan received the common law free from any older statutory admixture, it naturally followed the English divisions of law and equity, and under the enlightened administration of Chancellors Farnsworth and Manning the practice, which was largely shaped by legislation in accordance with their views, received the form which it now has, and our statutes embody in a very intelligible way a system so complete as to need very little aid from other sources.

* * * * * * * * *

"The sections of the statute which refer to the action of this Court in appellate cases remain unchanged, and are the only statutory method of bringing into this Court chancery appeals. As it is not competent for the Legislature to deprive the Supreme Court of its revisory jurisdiction over all the other State tribunals, no legislation which practically destroys it is valid."

## APPENDIX II.

In contrast to the Federal Rule and Practice, under the California law the trier of the facts is the *constitutional* finder of the facts, and the power of the reviewing court to annul his findings (if same are supported by substantial evidence) is prohibited by the California Constitution.

In *Cherry v. Hayden,* 100 Cal. App. 2d 416, the Appellate Court declared at page 419, that the trier of the facts is *the constitutional finder of the facts.*

The constitutional prohibition to annul findings of the trier of facts (if same are supported by substantial evidence) is cogently expounded in the learned opinion of Judge Shenk in the leading case of *Tupman v. Haberkern,* 208 Cal. 256. At pages 262 and 263 of the opinion, the California Supreme Court declared as follows:

(1) Prior to the adoption of section 4½ of Article VI of the Constitution, in 1914, section 4¾ of the same article, in 1926, and section 956a of the Code of Civil Procedure, in 1927 (Stats. 1927, p. 583), it was firmly established that an appellate tribunal in this state possesses none of the functions of a jury, and that the sole province of the court on appeal was to review the action of the trial court, correct its errors, *and thus pass upon questions of law only.* This was the established rule of common law. *Slocum v. New York Life Ins. Co.,* 228 U. S. 364 [57 L. Ed. 879, 33 S. Ct. Rep. 523, see, also, Rose's U. S. Notes].) In *Bauder v. Tyrell,* 59 Cal. 99, it was said: "The trial court decides as to the facts, the court of review (in this state) as to questions of law only * * * it is founded in the essential distinction between the trial and the appellate court, and *grows out of considerations of jurisdiction;* that it is the province of the trial court

to decide questions of fact *and of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion.*"

* * * * * * * * *

(5) Whether the error found to be present "has resulted in a miscarriage of justice" *presents a question of law on the record before the court,* and the purpose of the section (Section 4½ of Article VI of the Constitution) was to require the court to declare *as matter of law* whether the error has affected the substantial rights of the party complaining against it, *and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies.*" (Emphasis supplied.)

Even in criminal cases (where proof beyond a reasonable doubt is required) the constitution of California expressly states that the reviewing court has jurisdiction *"on questions of law alone."* (Const. Art. VI, Secs. 4-a and 4-b.)

In *People v. Gutierrez,* 35 Cal. 2d 721, 727 [221 P. 2d 22], the California Supreme Court said:

"After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows *that upon no hypothesis whatsoever is there sufficient substantial evidence to support it.*" (Emphasis supplied.)

In *Estate of Bristol,* 23 Cal. 2d 221, the California Supreme Court stated at pages 223 and 224, as follows:

"The rule as to our province is: "In reviewing the evidence . . . all conflicts must be resolved in favor of

the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary . . . principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences *can be reasonably* deduced from the facts, the reviewing court *is without power to substitute its deductions for those of the trial court.*" (Italics added.) The rule quoted is as applicable in reviewing *the finding of a judge* as it is when considering a jury's verdict. The critical word in the definition is *"substantial"*; it is a door which can lead as readily to abuse as to practical or enlightened justice. [3] It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding." (See also authorities cited in the footnote below.)[2]

Under Sec. 259a, C. C. P., a commissioner appointed by the Court to conduct a hearing is empowered to take proofs and report his conclusions on factual matters;

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[2]*Bernicker v. Bernicker,* 30 Cal. 2d 439, at pp. 443-445; *Kelly v. Bank of America,* 112 Cal. App. 2d 388; *Potter v. Pacific Coal & Lbr. Co.,* 37 Cal. 2d 592, at pp. 597-598; *Estate of Teel,* 25 Cal. 2d 520; *Lauder v. Wright Investment Co.,* 126 A. C. A. 167, at pp. 170-171.

under Sec. 644, C. C. P., the finding of the referee or commissioner must stand as the finding of the Court, and under Sec. 645, C. C. P., the finding of the referee has the effect of a special jury verdict. (*Williams v. Flinn & Treacy,* 61 Cal. App. 352, 214 Pac. 1024.)

In *Rosati v. Heimann,* 126 A. C. A. 50 (decided June 16, 1954), an order of reference was made by the State Superior Court to determine the amount of indebtedness due from the defendant to the plaintiff. In passing upon the legal effect of the evidence under the "Uniform Business Records as Evidence Act" (C. C. P., Secs 1953e-1953h), Judge Moore, speaking for the unanimous court, declared as follows:

"Whether a book of accounts meets the requirements of the law either as to the proximity of the entries to the date of the transaction or as *to the accuracy of the entries, is a question to be determined by the trial court in the exercise of a sound discretion.*" (Emphasis added.)

The factual findings of the referee there were approved by the Superior Judge, and the appellate court ruled that said findings were conclusive upon the reviewing court.

Section 19 of Article VI of the Constitution of California provides:

"The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. *The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.*" (Emphasis added.)

It is the recognized and traditional rule that an issue of fact becomes an issue of law only where the evidence is such that only one conclusion can be reached by reasonable minds. In other words, if the evidence is such that reasonable minds might differ as to the conclusion to be reached, the issue is one of fact and not law, and an appellate court is bound by the determination of the trier of facts.

In *Washko v. Stewart,* 20 Cal. App. 2d 347, 348 (67 P. 2d 144), the California Appellate Court stated as follows:

"While the question of the sufficiency of the evidence to support a finding may be presented for review, the duty of the appellate courts stops when it has determined that there is some substantial evidence to support it. Ordinarily on appeal the court does not and should not pass upon the weight or preponderance of evidence, and it will uphold the finding of the trial court if there is some substantial evidence to support it, even though it would have decided otherwise if it had been the trier of the facts. (2 Cal. Jur. 912, 913.) No rule of appellate procedure is more firmly settled than this. In such cases the court is concerned only with the single inquiry, Does the record contain any substantial evidence tending to support the finding assailed?, and if there is such evidence, which is not inherently improbable, the answer must always be that the trial court has conclusively decided the question." (Citing cases.)

In *Potter v. Pacific Coast Lumber Co.,* 32 Cal. 2d 592, the Supreme Court stated, at pages 597-598, as follows:

"In the application of these settled rules to the present case, defendants properly recognize that 'A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment.' (Fewel & Dawes, Inc. v. Pratt, 17 C. 2d 85, 89.) Likewise, it must be said that the conclusions of a trier of facts from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal."

The doctrine of *pari materia* is discussed by the California Supreme Court in *In re Potterfield,* 28 Cal. 2d 91. The court stated at page 100 as follows:

> "It is a well recognized rule that for purposes of statutory construction the codes are to be regarded *as blending into each other and constituting but a single statute."* (Emphasis supplied.)

Sections 719 and 644 and 645 of the California Code of Civil Procedure *were all enacted in the same year (in 1872).* They are all *in pari materia* and the determination of the trier of the facts has the effect of a special jury verdict, which is conclusive and binding on the reviewing court under the California Constitution. The decision in the *garnishment Hartman* case (the first case referred to in footnote 12 of the opinion) was handed down *about fourteen years before the enactment of Sections 719, 644 and 645 of the California Code of Civil Procedure.*

## APPENDIX III.

What constitutes *substantial evidence* sufficient to uphold factual findings of the trier of facts was clearly defined in California, as follows:

"In *Potter v. Pacific Coast Lumber Co.,* 37 Cal. 2d 592, the California Supreme Court stated that substantial evidence is such which may *reasonably* support the finding of the trial court.

"In Estate of Teed, 112 Cal. App. 2d 638, the appellate court stated:

" 'Substantial evidence' meant such relevant evidence as a *reasonable man* might accept as adequate to support a conclusion, and is reasonable in nature."

There must be more than a conflict of words to constitute a conflict of evidence. (*Fewel & Dawes, Inc. v. Pratt,* 17 Cal. 2d 85, 89.)

The reviewing court has no constitutional power to reject or disregard legitimate inferences which may be drawn by the trial judge from the evidence. (*Palmquist v. Mercer,* 43 A. C. 91 at page 94.)

All questions as to the preponderance and conflict of the evidence are for the trial court and his determination is binding on the appellate court. (*Wilcox v. Salomone,* 119 Cal. App. 2d 704 at p. 711.)

In the case at bar the record conclusively shows that the integrity of the books and records of the judgment debtor, and particularly in reference to Coffman's asserted offset against the judgment debtor was refuted by the financial statement signed by Coffman and submitted to the Hollywood State Bank. [Cr. Ex. 2.] The record

further conclusively shows that the integrity of the entries in the books and records of the judgment debtor was refuted by Coffman's sworn allegations in his answer filed in the case of *Thomas F. Fitzgerald v. Coffman,* referred to at page 88 of the record.

In *Branson v. Caruthers,* 49 Cal. 274, the testimony of the plaintiff at the trial was inconsistent with the factual allegations made by him in the pleadings; and the court ruled that the plaintiff's testimony at the trial lacked substantiality *as a matter of law.*

In *Beatty v. Pacific States,* 4 Cal. App. 2d 692, the court held: That contradictory factual allegations made in a pleading constitute purjury.

In 46 Corpus Juris, page 230, a large number of authorities are cited to the effect that: "Weight of evidence is not to be adjudged by the language of witnesses alone. It shocks the sense of legal morality to argue that if the trial justice is convinced from his observations of the witnesses and from the atmosphere of the trial that a case has been presented and a verdict secured by perjured testimony, he is bound to receive and approve the verdict, and may not set it aside. Such a rule would make the judge a consenting party to a fraud upon the administration of the law. There is no doubt that the trial judge not only has, but is bound to exercise, the power of setting aside a verdict which in his opinion has been secured by perjury."

## APPENDIX IV.

In civil proceedings, proof beyond a reasonable doubt is not required. This is the universally established law and the California law is in accord.

In *Cooper v. Spring Valley Water Co.,* 16 Cal. App. 17, the court declared, at pages 21 and 22, as follows:

"In civil cases the affirmative must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence . . ." (C. C. P., sec. 2061, subd. 5.) In other words "the result should follow the preponderance of the evidence." (2 Wharton on Criminal Evidence, 1246), and this rule applies to all civil cases alike, even though the theory of the case involves, as it does here, an accusation of felony. (Citing cases.) This was declared to be so by our Supreme Court as early as the case of *Ford v. Chambers,* 19 Cal. 143.)

* * * * * * * * *

"It is the generally accepted doctrine in other jurisdictions that in civil cases, where a criminal act is directly pleaded or only incidentally involved, such criminal act may be established by a preponderance of evidence." (Citing cases.)

"It may be safely asserted that there is no rule of law sanctioned by the weight of authority which requires the plaintiff in a civil action, even though the result thereof imputes a crime, to prove his case with the same certainty that is required in a criminal prosecution. (Citing cases.)

"The reason for the rule limiting the burden of a plaintiff's proof in such cases to a preponderance of evidence

is founded largely "in the importance of preserving the distinction between civil and criminal cases with the growth of the criminal law. Almost every tortious act is by statute made indictable if done willfully or maliciously; and the courts should be reluctant to adopt, in civil cases, the rules peculiar to criminal law, lest wrongdoers be enabled to avoid civil liability, as well as escape criminal responsibility, under cover of the rules of criminal prosecution, the object of which is punishment only."

It was declared by the Michigan Supreme Court (*Stephenson v. Golden,* 279 Mich. 710, at page 734, 276 N. W. 849), that "there is no rule of law or of judicial reasoning that adopts any sliding scale of belief in civil actions." The court declared that in civil actions or proceedings, proof by the preponderance of the evidence satisfies the legal requirement. This is the universally accepted law, which is rooted in the importance of preserving the distinctions between civil and criminal cases, lest the wrongdoers be enabled to avoid civil liability. (*Cooper v. Spring Valley Water Co., supra.*) (See also 124 A. L. R. 1378.)

Section 2061(5), C. C. P., expressly states that a decision of the trier of the facts must be according to the preponderance of the evidence; and Section 2103, C. C. P. expressly provides that a decision of a referee appointed by the trial judge must likewise be according to the preponderance of the evidence.

The preponderance evidence rule equally applies to civil proceedings involving conversions of assets by a trustee, and it is sufficient to prove said conversion only by a preponderance of the evidence, and not beyond a reasonable doubt. (62 A. L. R. 1449.)

## APPENDIX V.

The rule requiring proof by clear and convincing evidence *is directed to the trial judge*; and his finding, if supported by the preponderance of the evidence, is conclusive upon the reviewing court.

*In re Jost,* 117 Cal. App. 2d 379, involved a naturalization proceeding in which the application for naturalization was opposed by the government on the ground that the applicant was guilty of *bad faith* in that he had previously claimed an exemption from military service on the ground that he was a conscientious objector. The question of his bad faith was the crucial issue in the case. The court declared that the burden of proof was upon the government to prove the bad faith of the applicant by "clear and convincing evidence," and "clear, explicit, unequivocal evidence, so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind." The court ruled that this rule was directed to the trial judge, and in passing on the effect of substantial evidence under this rule, the court declared, at pages 387 and 388, as follows:

"No citation of authority should be necessary to demonstrate our position in respect to such a finding. (3) This court's duty, on appeal, begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might *reasonably* have reached the same conclusion which was reached. * * * (4) When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. (5) So far as the court has passed upon the weight of the evidence or credibility of witnesses, its implied findings are conclu-

sive even when based upon conflicting affidavits, and where the conflict is not sharp but only such as to create an uncertainty in the mind of the judge. (*Hyde v. Boyle,* 105 Cal. 102 (38 Pac. 643); *Kern Valley Bank v. Koehn,* 10 Cal. App. 679 (103 Pac. 173).)

"In *LaJolla Casa de Manana v. Hopkins,* 98 Cal. App. 2d 339 (219 P. 2d 871), this court said:

" 'A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts . . . Where conflicting inferences may be drawn from testimony, this court is bound by the findings of the trial court as conclusively as in other cases of conflict.'

"(6) If the finding of fact is based upon a reasonable inference it is not within the power of an appellate court to set it aside any more than it is within its power to set aside any other finding supported by any legal evidence. An appellate court cannot review a finding because in its judgment the inference adduced by the trial court is improbable or more unlikely to be true than the opposite one. Such a finding is as completely a finding based upon good and sufficient evidence as any other finding of fact." (Petition for hearing in the Supreme Court was denied.)

In *Wilcox v. Salomone,* 118 Cal. App. 2d 704 at page 710, the Court stated as follows:

"[1] It is presumed that a deed absolute on its face is what it purports to be. (17 Cal. Jur., Mortgages, §§56 and 57, and cases cited therein.) [2] However,

it is a well settled rule that a deed absolute in form may be shown to have been intended as a mortgage, and that such a deed is a mortgage if intended as security for the performance of an obligation. (17 Cal. Jur., Mortgages, §41; Civ. Code, §2924.) [3, 4] The burden of proving that a deed absolute is a mortgage rests upon the party who alleges it, *and the evidence must be clear, satisfactory and convincing; unequivocal and indisputable.* (17 Cal. Jur., Mortgages, §§58, 59.) [5] Whether the evidence to show that a deed was intended as a mortgage is clear and convincing *is a question for the trial court, whose determination on conflicting evidence is not reviewable on appeal."* (Emphasis supplied.)

In *Thomasset v. Thomasset,* reported in 122 A. C. A. (Dec. 1953), 148 at page 155, the Court said:

[4] *There are expressions in the decisions to the effect that the separate character of property acquired after marriage is to be established by "clear and convincing evidence," "clear and decisive proof," "clear and satisfactory proof."* (Citing cases.) These expressions state a rule of evidence *directed to the trial court;* and if that court finds that the evidence meets the rule, a reviewing court must accept that determination as conclusive *if there is substantial evidence to support it.* (Citing cases.) The decision of the trier of fact must be according to the preponderance of evidence. (C. C. P., Secs. 2061(5), 2103.) [5] Whether the evidence adduced to overcome the presumption of community property is sufficient for the purpose *is a question of fact for the trial court.* (Citing cases.)

In *Perske v. Perske,* 125 A. C. A. 946 at page 952 (decided June 9, 1954), the Court states:

"Appellant urges that, under this evidence, the trial court was bound by the doctor's and her testimony, inasmuch as such testimony was uncontradicted, and was without power to disregard it. [4] Of course, a trial court cannot arbitrarily disregard uncontradicted testimony. [1c] But where, as here, the trial court (by *its finding that the property was not purchased entirely with appellant's funds*) has necessarily found that the so-called uncontradicted evidence was false, an appellate court will not interfere if there is any basis at all to support the trial court * * * The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. (Citing cases.)" (Emphasis supplied.)

This rule is well settled, is supported by many authorities, and is applicable to this case.

See also, authorities cited in the footnote below:*

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**Rogers v. Mulkey,* 63 Cal. App. 2d 567, at p. 573; *LaJolla, etc. v. Hopkins,* 98 Cal. App. 2d 339, at pp. 345-346, 219 P. 2d 871; *Massow v. Granaglis,* 120 Cal. App. 2d 24, at pp. 27-28, 260 P. 2d 635; *Schnepfe v. Schnepfe,* 120 Cal. App. 2d 463, at pp. 466-7, 261 P. 2d 321.

## APPENDIX VI.

Coffman's conversion of the property and assets of the judgment-debtor in excess of $20,000.00 was established conclusively and undisputably by the documentary evidence, and same constituted an indebtedness which can be reached in a supplemental proceeding for the reason that same could be reached by a Creditor's Bill in Equity (*Travis Glass Co. v. Ibbertson,* 186 Cal. 724). *The conversion was also established by Coffman's sworn allegations in his answer in the Fitzgerald case, referred to at page 88 of the record.*

*As a matter of law,* Coffman's claim of his indebtedness to the judgment-debtor was a sham, and under no circumstances could Coffman claim an interest adverse to the judgment-debtor.

In *Saracco Tank & Welding Co. v. Platz,* 65 Cal. App. 2d 306, the California Appellate Court declared that the assets of a debtor corporation, immediately upon its becoming insolvent, became a trust fund for the benefit of all of its creditors, and that a director of an insolvent corporation is a trustee for the benefit of the creditors of said corporation.

In 15A Fletcher's Cyc. of Corp., perm. ed. (1938), section 7369, at page 59, it was stated that: "The theory of the trust fund doctrine is that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors. * * *"

Section 2229 of the California Civil Code reads as follows: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

Section 2232 of the California Civil Code reads as follows: "No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter."

Section 2236 of the California Civil Code prohibits the trustee to mingle the trust property with his own.

Section 2237 of the California Civil Code provides that a trustee who uses and disposes of the trust property may be required to account to the beneficiary.

Perry on Trusts and Trustees (Vol. I, 7th Ed., Par. 433, at p. 721) states that under no circumstances can a trustee claim or set up a claim to the trust property adverse to *cestui que trust,* and that under no circumstances could a trustee deny the title of the beneficiary.

In *Purdy v. Johnson,* 174 Cal. 521, the California Supreme Court declared at page 529, that a trustee cannot use trust property to secure repayment of advances made by him personally.

See also authorities cited in Appellee's brief at pages 31 and 32.

## APPENDIX VII.

Appellant's contention urged in his brief and at the oral argument that the Master and the District Judge lacked judicial power to adjudicate the factual integrity of his offset, is furthermore not reviewable on this appeal, for the following procedural reasons:

A. This contention was not advanced at any time at any of the hearings before the special master. It was the duty of the Appellant to raise this contention before the Master. (*Rosati v. Heimann,* 126 A. C. A. 50, decided June 16, 1954.)

B. Appellant expressly stipulated in open court that the factual validity of his offset should be adjudicated by the special master. (See order re-reference at p. 77 of the record.) No reservation was made in said order of re-reference challenging the power of the special master to adjudicate this stipulated factual issue.

C. The ground of Coffman's belated claim bearing on the power of the Master to adjudicate this issue was not excepted to in writing, as required by Section 259a(2), C. C. P.

D. Nor was this ground advanced in Coffman's Exceptions to the Supplemental Report of the Special Master. (See Supplemental Report of Special Master beginning at p. 80 of the Record, and Coffman's Notice of Application to reject said Supplemental Report, beginning at p. 94 of the Record.) The Notice of the application to reject said Supplemental Report of the Master was

made on the sole ground that the Master's Supplemental Report and his findings of fact and conclusions of law *were not supported by the evidence.*

In *Riverside Heights Orange Growers' Ass'n v. Stebler,* 240 Fed. 703, this Court stated, at page 706, as follows:

"Exceptions to reports of masters in chancery are in the nature of a special demurrer, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted." *Story v. Livingston,* 13 Pet. 359, 366, 10 L. Ed. 200 (citing *Wilkes v. Rogers,* 6 Johns. (N. Y.) 566). "A party neglecting to bring in objections cannot afterwards except to the report." *Id.; McMicken v. Perin,* 18 How. 507, 510, 15 L. Ed. 504. "Proper practice requires that objections to a master's report shall be taken in that (the trial) court, that any errors discovered therein may be rectified by the court itself, or by a reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this court." *Topliff v. Topliff,* 145 U. S. 156, 173, 12 S. Ct. 825, 832 (36 L. Ed. 658).

See also the authorities listed in 5 Moore's Federal Practice, in Notes 14 and 15, at page 2969, and in Notes 20, 21 and 22, at pages 2970 and 2971.

## APPENDIX VIII.

*Comment on decisions cited in footnote 12 of the Court's opinion, at page 6:*

The *Wolfjen v. Dolton* case, 24 Cal. 2d 878, has not the remotest kinship to the factual situation presented by the present record. It did not involve a supplemental proceeding, and it did not concern the construction of either Section 719 or of 720, C. C. P. Nor did it involve the constitutional question whether the findings of the trial court were conclusive and binding upon the reviewing court. It was an action in equity, instituted by the judgment-creditor against directors of the debtor corporation, praying for judgment declaring that the defendants were holding moneys for the use and benefit of the corporation. Upon conclusion of the plaintiff's case, a judgment of nonsuit was granted and the case reached the Supreme Court on an appeal from this judgment. The *prima facie* case established by the plaintiff's proofs was as follows:

(1) That the defendants had borrowed from a bank substantial sums of money and with the money so borrowed, and other funds, they organized the debtor corporation, of which they subsequently became its directors.

(2) That upon its incorporation the debtor corporation and the defendants entered into a valid and binding contract providing that the loans heretofore made by the defendants should be repaid by the debtor corporation *"out of the first net earnings"* (emphasis by the Court).

(3) That notwithstanding the fact that the debtor corporation had at no time earned any income (p. 882), the defendants withdrew funds from the debtor corporation in repayment of the loans advanced to the debtor corpo-

ration prior to its incorporation in violation of said written contract.

(4) That a demand was made by the judgment-creditor upon the defendants that suit be instituted by the corporation for the recovery of said funds, which demand was not complied with by the defendants.

Upon the conclusion of plaintiff's proofs, the defendants made a motion for a nonsuit, basing their contention on the ground that plaintiff had an adequate remedy at law inasmuch as plaintiff's remedy was confined to a supplemental proceeding.

In reversing the judgment of nonsuit, the Supreme Court ruled as follows:

(1) That the remedy provided by a supplemental proceeding was not exclusive of any other remedy which may be available to a judgment-creditor.

(2) That the judgment-creditor was not precluded from resorting to an action in equity inasmuch as his remedy under a supplemental proceeding was not adequate.

(3) That plaintiff made out a *prima facie* case and had established a clear breach of contract on the part of the defendants, since the contract provided that the loans made by the defendants were to be repaid out of the first net earnings and not out of the property or assets of the judgment-debtor.

(4) That the lower court had no legal right to grant a judgment of nonsuit for the reason that the plaintiff had established a *prima facie* case.

(5) That the defendants should have been compelled to present such evidence as they might have in their defense to justify the breach of said contract on their part.

It is respectfully submitted that this case is not an authority for the proposition that Coffman was entitled to a plenary action under Section 720, C. C. P. It would seem that this case supports appellee's contention rather than the contentions made by the appellant. This case is in accord with the doctrine announced in the Michigan State Bar Journal (heretofore referred to) which is to the effect that the choice of the most effective remedy (whether by supplementary proceedings or by an action in equity) is the problem of the judgment-creditor.

*Ex parte Hollis,* 59 Cal. 405, involved an insolvency proceeding, and an application for discharge upon a writ of habeas corpus. In this case creditors of a corporation had filed a petition in the State Superior Court to have the corporation adjudged an involuntary insolvent under the provisions of an Act of the legislature, entitled "An act for the relief of insolvent debtors, for the protection of creditors, and for the punishment of fraudulent debtors." Upon the filing of the petition the Court made an order requiring the corporation to show cause why it should not be adjudged an insolvent debtor, and a receiver was thereupon appointed by the Court to take charge of the estate of the corporation. *The order to show cause was not served on the petitioner, and he was not a party to the proceeding.* (Here Coffman was served with an order to show cause. A motion was filed by the petitioner to have the receivership order set aside, which was denied by the trial judge. Thereupon, a demand was made by the receiver upon the petitioner for the delivery to him of the assets of the corporation, which demand was not complied with by the petitioner. Upon his failure to comply with the receiver's demand an order was made by the Court requiring the petitioner to show cause why he should not be adjudged guilty of contempt of court, and

why he should not turn over to the receiver the assets in his possession belonging to the insolvent debtor. The petitioner denied that he had any money or effects belonging to the corporation except that he had collected certain rents *which were his own property.* In ruling that the Superior Court had no jurisdiction, the Supreme Court made the following significant statement, at page 412:

"We think such a power cannot be exercised over a party, *unless he has collected and holds the money and effects as trustee for the estate of the insolvent debtor.* . . ." (Emphasis supplied.)

The Court further held that the petitioner was not an officer of the court and not a party to the proceedings in insolvency, and that he claimed the property in his possession *adverse to all the world.* The Court further held that the petitioner had good title to the property, though it may have been obtained by fraudulent and corrupt practices between him and his grantor, *"except creditors and subsequent purchasers of the grantor."* (At p. 413.) The Court further held that the proceeding there was in legal effect analogous to proceedings supplementary to execution by a judgment-creditor *against a garnishee* who claimed the property as his own. (At p. 413.)

Without further burdening the Court with excerpts from this case, it is sufficient to point out (a) that Coffman was not a garnishee; (b) that Coffman was *a trustee* who could not assert any title against the judgment-creditor, and had no interest adverse to the insolvent corporation; and (c) that the proofs in the instant proceeding revealed, *as a matter of law,* that the property was the property of the judgment-debtor, which Coffman held in trust for the judgment-creditor.

*Lewis v. Chamberlain* (108 Cal. 525, 41 Pac. 413) also involved the relationship between a judgment-debtor and a third party garnishee. In this case the garnishee (the wife of the judgment-debtor) filed a written and verified answer specifically denying that the property in her possession was the property of the judgment-debtor, and specifically asserting under oath that the property was her own property. No such verified answer was filed by Coffman; and the record shows beyond dispute, and as a matter of law, that the property was the property of the judgment-debtor and that Coffman held said property *in trust* for the judgment-creditor.

*Deering v. Richardson-Kimbal Co.* (109 Cal. 73, 41 Pac. 801) also involved a relationship between the judgment-debtor and an innocent garnishee. It also involved claims of other persons who claimed liens upon the money in the possession of the garnishee bank. *The trial judge expressly found that there was no pretense of bad faith on the part of the bank* (p. 83). In the case at bar, as previously noted, Coffman *was not a garnishee,* but a trustee; and the trial court expressly found that his claim against the judgment-debtor was made in bad faith. Clearly, Coffman's position is not analogous to the position of the bank, who was an innocent party. The fact that the garnishee bank was acting in good faith, was an undisputed fact. It was further *undenied* that the claims of the other parties who claimed liens upon the money in the possession of the bank were made in good faith.

The early case of *Hartman v. Olvera,* 51 Cal. 501, involves the legal relationship existing between a judgment-debtor and a *third party garnishee,* and it does not involve or touch upon the legal and equitable relationship

existing between an insolvent corporate judgment-debtor and its majority stockholders, officers and directors (like in the case at bar). Furthermore, it should be noted:

(a) That this case was decided prior to the adoption of Sections 644 and 645 of the Code of Civil Procedure, which were enacted *in 1872.* Under said sections the finding of a referee under a general order of reference has the effect of a special jury verdict, and such determination cannot be constitutionally disturbed by the reviewing court.

(b) That the constitutional limitation imposed by the California constitution on the power of the reviewing court to disturb findings of trial judges or of referees under orders of general reference, was not discussed in the opinion.

(c) Under Section 644 of the Code of Civil Procedure the finding of the referee or commissioner must stand as the findings of the Court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the Court. Said section, as previously pointed out, was enacted *in 1872, about fourteen years subsequent to the decision in Hartman v. Olvera, supra. Section 645 was likewise enacted about fourteen years after the decision in Hartman v. Olvera, supra;* and Section 719, C. C. P., were also enacted in 1872.